IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 16TH MARCH 2007 / 25TH PHALGUNA 1928

Crl.Rev.Pet.No. 169 of 2000()

CRA.313/1999 of SESSIONS COURT, THRISSUR
CC.180/1996 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, THRISSUR

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REVN. PETITIONER(S):

STALIN VARGHESE, S/O.VARGHESE,
CHOWOOKKARA HOUSE,
VENGINISSERI DESOM, DO. VILLAGE,
THRISSUR TALUK.

BY ADV. SMT.CHINCY GOPAKUMAR
SRI.VARGHESE PREM

RESPONDENT(S):

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1. E.D.RAMAN, ERINJERIPPURATH HOUSE,
KUTTANKULANGARA LANE, POONKUNNAM,
THRISSUR-2.

2. THE STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

ADV. SRI.K.PADMANABHAN FOR R1
SRI.M.V.MATHEW FOR R1
PUBLIC PROSECUTOR SRI.C.K.SURESH FOR R2

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 16/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

CRL.R.P.NO.169 OF 2000

Dated this the 16th day of March, 2007

O R D E R

Revision petitioner was convicted and sentenced by the Magistrate's Court to undergo simple imprisonment for six months and to pay a fine of Rs.50,000/- under Section 138 of the Negotiable Instruments Act ('the Act', short). In appeal, the conviction was confirmed by the learned Sessions Judge, but sentence was modified to undergo simple imprisonment for seven days and to pay compensation of Rs.55,000/- under Section 357(3) of the Code of Criminal Procedure and in default to undergo simple imprisonment for a period of three months. Rs.50,000/- out of the compensation was ordered to be paid to the complainant and the balance has to be credited to the State as compensation for the loss suffered by it in terms of loss of resources and judicial time spent for the resolution of the controversy between the parties. The said order of conviction and sentence are challenged in this revision.

2. According to the prosecution, the petitioner herein executed Exhibit P1 cheque on 1.3.1996 at the house of the complainant and handed over the same to him for discharge of the debt. Exhibit P1 was dishonoured on presentation before the Bank. A notice was issued as Exhibit P4 calling upon the accused to pay the amount. But he sent a reply notice, Exhibit P7 raising false allegations. The complaint was filed alleging offence under Section 138 of the Act after complying

with the legal formalities.

3. An evaluation of the evidence placed before the court, trial court held that the case set up by prosecution is proved. Learned Sessions Judge also found that the evidence of PW1 proves that Exhibit P1 was duly executed by the revision petitioner and issued to him for a discharge of legally enforceable debt/liability. The court also found that the evidence of DW1 and Exhibits D1 to D3 cannot in any way help the revision petitioner to establish its case that Exhibit P1 cheque was not issued by him to the complainant for the discharge of a debt or liability.

4. On going through the judgments of the courts below, it can be seen that both the courts concurred in the finding that the cheque Exhibit P1 was issued by the accused for the discharge of a legally enforceable debt/liability. This conclusion was arrived at from the evidence of PW1. To prove an offence under Section 138 of the Act, the court must be satisfied that the cheque is drawn by the accused for the discharge of a debt or liability.

5. The admission of the signature and the handwriting in the cheque may not be sufficient to prove all the ingredients of Section 138 of the Act (***vide Jemini v. Chenadran and another*** (2007(1) KLJ 453). Apart from proving that a cheque was drawn by the accused, the prosecution is bound to establish that the purpose for which the cheque was drawn. The purpose of drawing of the cheque assumes

great relevance. A cheque can be executed and drawn under various circumstances. Even in favour of a person to whom the accused owes money on a particular transaction, he need not draw the cheque, discharging the debt which he owed to such person. The prosecution has a duty to prove that the drawing of the cheque was for the discharge of a debt or liability.

6. The case set up by the accused is that he did not owe any money to the complainant and for that purpose he had not drawn Exhibit P1. The case set up by the accused is that the complainant in this case filed a false complaint against the revision petitioner at the instance of his father-in-law who was examined as DW1. According to the accused, DW1 had filed a criminal complaint against the accused's father alleging offence under Section 138 of the Act in respect of a cheque covering an amount of Rs.1,05,000/-. But the accused's father was acquitted in the said case and the order of acquittal is marked as Exhibit D3. It is brought out from the evidence of DW1 that he did not pursue the matter, since he was advised legally that there is some infirmity in the case. Therefore, the complaint filed against the accused's father was given up by DW1, as there was no chance of winning the case.

7. According to the accused, it is in such circumstances that DW1 managed to get the present complaint filed through none other than

his son-in-law. For this purpose, DW1 procured the cheque belonging to the accused somehow or other. But he was not aware in what manner he had procured the same. The definite case of the accused is that he had not issued or handed over Exhibit P1 cheque to the complainant for the discharge of the alleged debt or liability.

8. In this background, the case set up by the prosecution has to be appreciated and assessed. The evidence regarding the drawing of the cheque, handing over the cheque, incurring of the debt etc. there is only oral testimony of PW1 which is not supported by any other materials except cheque, Exhibit P1. When questions were put to PW1 whether DW1, the father-in-law of PW1 had filed a complaint against the accused's father and whether there was having transaction between DW1 and the accused's father etc., PW1 did not deny the same, but pleaded ignorance.

9. It can be seen from Exhibit D1 that a complaint was filed by DW1 against accused's father stating that there was transaction between the accused's father and DW1 ever since September, 1993 onwards. As per the allegation in the complaint, on several days money was lent to accused's father by PW1 and a total of Rs.1,05,000/- was paid. Therefore, if the allegations made by PW1's father-in-law in Exhibit D1 are accepted, it has to be held that the accused's father and DW1 had financial transactions for a period about 3 years prior to the

transactions alleged in this case. It is also clear that such amounts were not repaid by the accused's father to the complainant.

10. But the complainant wants the court to believe that DW1 recommended PW1 to give a huge amount of Rs.50,000/- to the accused. It has come out from the evidence of PW1 that while paying the said amount, he had not taken any document from accused to evidence such payment. No document was executed nor even cheque was insisted upon for ensuring the repayment of such amount. When DW1 is aware that the amounts paid to accused on several dates from 1993 onwards were not repaid even in 1996, it is highly improbable that the father-in-law will advise the son-in-law to hand over Rs.50,000/- without support of any documentary evidence or atleast a cheque.

11. The evidence of PW1 shows that DW1 had seen PW1 giving the amount to the accused. It was brought out in cross-examination that borrowal was witnessed by DW1. Though PW1 did not state in the complaint on which dates the amounts were given, in the cross-examination he stated that those were given on 8.1.1996 and 31.1.1996. It is to be borne in mind that though the accused allegedly promised to return the money within 10 to 20 days of the first payment, he had not returned the money within such period, but on the other hand, PW1 gave some more money on 31.1.1996. The

conduct of PW1 and DW1 has to be kept in mind while entering a finding whether the evidence of PW1 proved the case set up by him.

12. PW1 has a case that the amount which he raised was the amount which he had received as per two bills from two establishments. But those are borne out from the documents also. The best evidence to prove that PW1 had the source of income to pay the amount would be such documents. But those documents are not produced. PW1 admitted that his father-in-law had seen the amount being given. PW1 did not examine his father-in-law. Atleast when the accused examined DW1, some admissions would have been procured from him to support the evidence given by PW1. This was also not done. There is nothing in the evidence of DW1 to show that he had seen money being given by PW1 to the accused.

13. In such circumstances, the evidence of PW1 regarding the payment of money and the issuance of cheque for the discharge of the said debt will not be sufficient to hold the relevant fact as proved. A fact can be said to be proved if on consideration of the matters before the court the court either believes it to exist or considers its existence so probable with a prudent man or under the circumstances of the particular case to act upon the satisfaction that it exists. The presumption under Section 139 of the Act applies only if the pre-

requisites under the said Section are made out. The prosecution can take the aid of presumption under Section 139 of the Act to prove the case if the complainant establishes that he is the holder of the cheque as defined under Section 8 of the Act.

14. But the evidence which is already discussed will not be sufficient to prove that the complainant is the holder of the cheque. It will not be sufficient to hold that the complainant is entitled to receive or recover the sum stated in the cheque from the accused, because the evidence is not quite probable to establish such fact. Therefore, the presumption under Section 139 of the Act is not available in this case and the prosecution is bound to prove the ingredients of Section 138 that the cheque was drawn for the discharge of a debt or liability. But the prosecution failed to prove the same.

15. Both the courts below have not considered the issue in the right perspective. But it was held that the evidence of PW1 shows that the revision petitioner borrowed the amount from him and that Exhibit P1 was issued for the discharge of such debt. The evidence which I have already discussed will not lead to any such belief that accused could have borrowed such amount from PW1. The court below has also proceeded as if Exhibit P1 cheque was admittedly issued by the accused. No such admission was made by the accused.

16. On the other hand, case of the revision petitioner was that

DW1 procured the cheque somehow or other. As I have already held, the question is not whether the cheque is executed or not but prosecution has also to establish the purpose for which the cheque was drawn. Only because the cheque which was produced contained the handwriting of the accused, the court cannot jump to the conclusion that such drawing of the cheque was for the purpose of discharge of a debt or liability. A presumption under Section 139 of the Act will be available only if the complainant proves that he is the holder and that he had received the cheque from the accused. Both these facts are not established by satisfactory evidence. It is only if facts are established along with the other requirements under Section 139 of the Act that the court can presume that the purpose for drawing of the cheque referred to in Section 139 of the Act is for the discharge of a debt or liability.

17. Though complainant would contend that the cheque was received by him from the accused and it was witnessed by DW1, DW1 has no such case DW1 was summoned and examined at the instance of the accused. The evidence of PW1 is highly interested. Without any independent corroboration on the facts and circumstances of the case, it is too insufficient to hold that the cheque was handed over by him to the complainant. In fact, the complaint would reveal that the cheque was handed over on 1.3.1996. But in evidence, PW1 did not say on

which day the cheque was handed over. At any rate, there is no evidence to show that the cheque was handed over on any particular day to the complainant by the accused. In the above circumstances, the conviction and sentence passed against the accused are unsustainable and those are liable to be set aside. The evidence of PW1 and the production of Exhibit P1 is too insufficient to prove the prosecution case beyond reasonable doubt.

In the result, the conviction and sentence passed against the revision petitioner are set aside. He is acquitted of the offence under Section 138 of the Act. He is set at liberty forthwith. The amount if any deposited shall be released to the revision petitioner.

The Revision Petition is allowed.

K.HEMA, JUDGE

vgs.